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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1950

No. 30

THE UNITED STATES OF AMERICA,

*Appellant,*

vs.

UNITED STATES GYPSUM COMPANY, SEWELL  
L. AVERY, OLIVER M. KNODE, *et al.*,

*Appellees.*

**BRIEF FOR APPELLEES UNITED STATES GYPSUM  
COMPANY, SEWELL L. AVERY and OLIVER M. KNODE**

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October 11, 1950

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IN THE  
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*vs.*

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KNODE, *et al.*,  
*Appellees.*

No. 30

**BRIEF FOR APPELLEES UNITED STATES GYPSUM  
COMPANY, SEWELL L. AVERY and OLIVER M. KNODE**

**Opinions Below**

The opinions of Judges Garrett and Jackson and the dissenting opinion of Judge Stephens on appellant's motion for summary judgment (R.\* 102-105) have not been reported. The dissenting opinion of Judge Stephens which was filed November 7, 1949 (R. 191-194), upon the entry of the decree from which appellant has appealed, is also not reported.

The opinion of the District Court on appellees' motion to strike and its opinion on appellees' motion to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure (R. 3933) are reported, respectively, in 53 F. Supp. 889 and 67 F. Supp. 397. The opinion of this Court reversing the District Court's judgment of dismissal is reported in 333 U. S. 364.

\*In accordance with the procedure adopted in appellant's brief (p. 1, fn. 1), reference to the printed record on this appeal will be made by using the letter "R", and reference to the printed record on the prior appeal in this case will be made by using an italicized letter "R".

## Jurisdiction

The jurisdiction of this Court was invoked by appellant under the provisions of Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended (15 U. S. C. A. § 29). Probable jurisdiction was noted by this Court on May 29, 1950 (339 U. S. 960; R. 376).

## Statute Involved

The material portions of Sections 1, 2 and 4 of the Sherman Act are as follows (15 U. S. C. §§ 1, 2, 4):

“§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

“§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209.

“§ 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective dis-

tricts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. . . . July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

### **Statement of the Case**

This is a civil-action instituted by the United States in August, 1940, in the District Court of the United States for the District of Columbia against six corporations and seven individuals, charging them with conspiring to restrain and monopolize interstate commerce in gypsum board and gypsum products in violation of Sections 1 and 2 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended (15 U. S. C. A. § 28), and a three-judge District Court was convened (R. 304-305, 367-368). The trial began in November, 1943, and appellant's case was closed on April 20, 1944. Thereupon, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, appellees moved to dismiss the case upon the ground that appellant had shown no right to relief.

On August 5, 1946, the District Court granted said motion and the complaint was dismissed. The appeal by the United States followed. The order dismissing the complaint was reversed by this Court on March 8, 1948 and the case remanded for further proceedings in conformity with the opinion of the Court (333 U. S. 364, 401-2). The mandate of this Court dated April 9, 1948, was issued in due course (R. 142-143).

On June 8, 1948, a conference of counsel for the several parties was held before the District Court for the purpose of determining what further proceedings should be had in the case (R. 1-28). After receiving suggestions from counsel and after hearing interpretations of this Court's opinion by counsel for the appellant and for the appellees, the District Court, in order that it might have something before it on which to rule, suggested that appellant file a motion for summary judgment (R. 22-25). It also suggested that appellees file proffer of the proof they proposed if the trial of the case should be resumed. In this connection, the court entertained the motion for summary judgment based upon the proposition of law that under the opinion of the Supreme Court on the record as made, the Government was entitled to summary judgment.

Appellant made and filed a motion for summary judgment on June 15, 1948 (R. 144). Appellees filed their proffer of proof on June 15, 1948 (R. 145). Oral argument on appellant's motion was heard by the court on June 29, 1948 (R. 29-102).

Appellant rested its motion for summary judgment on the ground, as stated by it, that there was no genuine issue of fact in the case with respect to any material fact essential to make out a combination or conspiracy in restraint of trade or monopoly under the Sherman Act. It was contended by appellant that the Supreme Court had held that the license agreements with price limitation and adherence thereto by appellees constituted a violation of the Sherman Act, notwithstanding the good faith of the appellees or the assumed legality of each separate license contract; that the appellees admittedly executed the license agreements and adhered to the price provisions thereof, with knowledge of

the adherence of the others; and that, it being sufficient to show price control under the licenses, appellant's purpose was to clear this to the essential point in issue—which it thought was not in issue—and ask for summary judgment on that basis (R. 34-35, 39-41, 44-47; see also R. 264-265).

The District Court sustained appellant's motion on the theory that if all the evidence were received on the issues in controversy and those issues were determined in favor of appellees, nevertheless as to the fundamental question in the case no evidence would alter the fact that the license agreements, industry-wide, with price limitation, adhered to by the appellees, under the decision of this Court constituted a violation of the Sherman Act notwithstanding the good faith of the appellees or the assumed legality of each separate license contract when made (R. 102-103). It entered its final decree on November 7, 1949, holding that the appellee companies had acted in concert in restraint of trade in gypsum board and had restrained and monopolized trade in the gypsum board industry. In particular, when it entered its final decree on November 7, 1949 (R. 185-191), the District Court, by Article III thereof, adjudged that:

"The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act."

This Court affirmed that adjudication. At the same time, it entered its order herein noting probable jurisdiction (339 U. S. 960) and its order dismissing the appeal of these appellees (339 U. S. 959).



## Summary of Argument

### I

Appellant presented its motion for summary judgment on the ground that it was entitled to judgment since there was no genuine issue of fact in the case with respect to any material fact essential to make out a combination or conspiracy in restraint of trade or monopoly under the Sherman Act. Specifically it rested its motion on the contention that under this Court's opinion a plurality of licenses containing price fixing clauses, industry-wide, with adherence to the price provisions thereof and knowledge of the adherence of others, constituted concert of action in restraint of trade, despite the assumed legality of each separate patent license. Appellant contended that for the purposes of the motion it was not essential to show other alleged abuses normally constituting a violation of the Sherman Act; that, if price control was shown, there was a case; and that it was the Government's intention to ask for summary judgment on that basis.

The District Court accepted appellant's view and granted its motion on that basis. Accordingly, in entering its judgment, the District Court quite properly did not extend the judgment beyond an adjudication that appellee companies acted in concert to fix, maintain and control prices of gypsum board and monopolize trade and commerce in the gypsum board industry, which adjudication this Court has expressly affirmed.

### II

In a proceeding of the kind here involved the District Court is vested with a wide range of discretion in molding

the judgment to the exigencies of the particular case, and, where the findings of violation are sustained on appeal, the appellate court will not recast the judgment except upon a showing of abuse of discretion. The trial court's exercise of this discretion will not be lightly disturbed.

### III

The District Court's decree gave appellant all the relief to which it was entitled. The admitted facts upon which judgment was entered were the industry-wide license agreements with price limitation adhered to by the parties with knowledge of the adherence of others. The decree as entered by the District Court not only invalidated and canceled the license agreements in their entirety but prohibited appellee companies, their officers and other representatives from continuing the performance or enforcement of any of the provisions of the patent licenses and of the price bulletins issued thereunder; from entering into any agreement of any kind for the purpose or with the effect of continuing, reviving or reinstating any such monopolistic practice; and from entering into any agreement or understanding by license agreements to fix, maintain or stabilize prices of gypsum board or the terms or conditions of sale thereof. Thus the decree not only effectively struck down each and every license and price bulletin thereunder which constituted the concert of action that the Court found to be illegal but also effectively prevented any similar restraint of trade in the future. In addition, the decree required appellee United States Gypsum Company to grant new licenses under the patents included in the cancelled licenses, under the conditions prescribed in the decree. The decree represented a proper exercise of discretion by the trial court. Appellant

has shown no sound reason why the trial court's exercise of its discretion in the framing of its decree should be disturbed by this Court.

#### IV

Appellant proposes that this Court recast the District Court's decree by substituting appellant's form of decree for that framed by the District Court. Specifically appellant urges the recasting of Article V of the decree to extend the scope of the injunctive provisions to gypsum plaster and other miscellaneous gypsum products and to matters clearly beyond the scope of the adjudication. It would extend the injunctive provisions to a territorial area which it deliberately eliminated from the case in order to be able to make its claim of price control under patent licenses throughout the entire gypsum board industry.

The provisions in portions of appellant's proposed Article V are so ambiguous as to raise great doubt as to their meaning and effect. Appellant's proposed Article V also is objectionable in undertaking to deal with controversial issues which were not adjudicated by the court and as to which appellees, by reason of the procedure adopted by appellant to obtain its judgment, have been deprived of their right to introduce their defense.

Appellant's proposals parallel the injunctive provisions which it submitted to the District Court and which were rejected by that court in the framing of its own decree. The decree as entered adequately enjoins the restraint of trade of which the appellee companies were adjudged guilty and effectively prohibits any similar restraint in the future. Appellant's proposals are unnecessary and unwarranted and the trial court's discretion in rejecting them should not be disturbed.

Appellant seeks a recasting of Article VI of the decree so as to include a stringent compulsory licensing provision under which appellee United States Gypsum Company would be compelled to grant licenses to any applicant on any one or all of its gypsum board patents now or hereafter owned, upon reasonable royalties to be determined by the District Court if the parties are unable to agree and with various restrictions as to the license provisions which would result in a license unacceptable to any patentee.

Appellant's contentions with respect to compulsory licensing were submitted to the District Court but that court concluded that such a provision was unnecessary to prevent further violations of the Act in a case like this. The court apparently found that the licensees, having acted in good faith in reliance upon *United States v. General Electric Co.*, 272 U. S. 476 (1926), should not be deprived of the opportunity for continued use of USG's patents under which they were licensed if they desired it, and gave them 90 days within which to apply for a new license. This was the underlying purpose and objective of Article VI of the District Court's decree, although it is true that the opportunity for obtaining such a license was open to any applicant. The provisions of Article VI were entirely appropriate to meet the objectives of the court in this regard.

• Compulsory licensing is a drastic remedy which has been imposed upon defendants in but a few contested cases. The only basis upon which it could properly be imposed is the necessity for so doing to prevent further continuance of the violation enjoined in the decree. It must be a necessary aid to the injunctive provisions of the decree.

The cases relied upon by appellant do not support its contentions for the inclusion of its proposed Article VI in a case like this where the summary judgment was obtained on the concert of action theory based on the plurality of licenses, and where it appeared that all the patents in the main license agreements had expired with the exception of three patents, that the price control under the licenses had ceased voluntarily years prior to the entry of the judgment, and there was no evidence that any board manufacturer had ever been refused a license by USG upon request therefor. *Hartford-Empire Co., et al. v. United States*, 323 U. S. 386 (1945) and *United States v. National Lead Co.*, 332 U. S. 319 (1947) are clearly distinguishable on the facts. Actually, the contested issue in *National Lead* was whether compulsory licensing should be on a royalty-free basis or on a reasonable royalty basis.

The various restrictions as to the license provisions incorporated in appellant's proposed Article VI are unnecessary and improper, as are the provisions which it would incorporate implying invalidity and lack of value in USG's patents, present and future.

Nothing said by appellant would warrant this Court in disturbing the exercise of the District Court's discretion with respect to the matter of compulsory licensing.

## VI

The trial court did not abuse its discretion in refusing to accord visitorial rights to the Department of Justice. Such a provision is a drastic one not loosely or automatically to be made. While constitutionally it is within the power and



discretion of the trial court to accord such rights to the Department of Justice, nevertheless, if that court determined as it did here that it was not reasonably necessary in order to wipe out the illegal price fixing licenses, such determination was not an abuse of discretion. We know of no case, and the appellant cites none, where this Court has held that it was an abuse of discretion for the trial court to refuse to incorporate such a provision in the decree which it entered.

The trial court did not abuse its discretion in refusing to include the individual appellees in its adjudication of violation of the Sherman Act. Appellant concedes in this Court that under the circumstances of this case injunctive provisions against the individual appellees *qua* individuals are unnecessary. Its position that it is nevertheless entitled to an adjudication that the individual appellees violated the Act is inconsistent and untenable. The adjudication on appellant's motion could only have been as to the appellee companies, as the District Court adjudged in Article III of its decree which this Court has affirmed.

The trial court did not abuse its discretion in refusing to assess all costs against appellees. This action was taken not on the theory, as appellant asserts, that appellees were entitled to preferred treatment. The matter of taxing costs is within the discretion of the trial court and, since appellant ultimately sought and obtained its judgment on a theory, evidence in support of which could have been presented within a much narrower scope both as to content and time than was done, the trial court was not guilty of an abuse of discretion in apportioning the costs.



## ARGUMENT

### I

#### **THE EXTENT OF THE DISTRICT COURT'S ADJUDICATION WAS THAT APPELLEE COMPANIES ACTED IN CONCERT TO FIX, MAINTAIN AND CONTROL PRICES OF GYPSUM BOARD AND MONOPOLIZED TRADE AND COMMERCE IN THE GYPSUM BOARD INDUSTRY.**

The amended complaint herein charged that appellees violated both Sections 1 and 2 of the Sherman Act by conspiring to increase prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors (*R. 10; 333 U. S. 364, 367*). The complaint further charged (*par. 46; R. 10-11*) that the asserted violations of the Sherman Act had been carried out by appellees in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by United States Gypsum Company (USG), and that said license agreements were not *bona fide* patent license agreements, but were entered into by defendants for illegal purposes and to give color of legality to their activities.

The answers of appellees denied all the charges made in the complaint (*R. 164-303*) and appellees offered to introduce their evidence in support of their denials (*R. 145-160*).

Every issue was in controversy except only that appellee companies admittedly executed the license agreements

and adhered to the price provisions thereof throughout the gypsum board industry with knowledge of the adherence of the others.

Appellant, as shown, presented its motion for summary judgment on the ground that under this Court's opinion, the *General Electric* case did not authorize a patentee to issue to all competitors in an entire industry a plurality of licenses containing price fixing clauses, and that such plurality of licenses and adherence to the price provisions thereof with knowledge of the adherence of others constituted concert of action in restraint of trade, despite the assumed legality of each separate patent license, under the doctrine that lawful acts may become unlawful when taken in concert. (R. 264).

Such concert of action being the gist of the offense, counsel for appellant urged that it was only necessary to establish its existence, without any issue as to a material fact, and that all of the other abuses normally constituting a violation of the Sherman Act, such as controlling plaster prices, resale prices of manufacturing distributors, eliminating jobbers and the like, could be laid aside. In answer to the court's question, counsel said that for purposes of the motion it was not essential to show those violations; that if price control alone was shown, there was a case; and that it was the Government's intention to ask for summary judgment on that basis (R. 34-35).

In this connection, counsel stated the essential elements he had to establish, namely, whether the appellees, erstwhile competitors, had combined to fix prices and whether that is so clear that there is no genuine issue as to any material fact. He pointed out that there was no question that they were former competitors; that they all took out licenses which contained a price fixing agreement; and that

all that remained was to show concert of action by showing that at some time they learned there were other competitors in the industry all guiding themselves by USG bulletins (R. 39-41).

Finally, to establish its position, appellant asserted that it had shown: (1) that the patent license contracts admittedly were executed by the several appellees and the price bulletins issued thereunder were adhered to by them (R. 40-41), (2) that at the meeting of May 23, 1929, USG offered a license under the foam application to any of the licensees who desired it, which licenses were subsequently accepted by the licensees and signed in November, 1929 (R. 45-46), (3) that appellees admitted the formation by USG in 1932 of Board Survey to police the licenses (R. 44), (4) that it was admitted that at the meeting of October 17, 1932, appellees learned they were all operating under similar licenses and price bulletins (R. 44-45), (5) that it was admitted that all of the licenses provided for price control (R. 45-46), and (6) that counsel for appellees admitted before the Supreme Court that because of the most favored nation clause in the patent licenses each of the licensees must have known that it was participating in a general plan (R. 47).

Counsel for appellant argued from this that there was a clear cut case of the appellees, erstwhile competitors, going into a plan to license the entire industry and fix prices, each eventually knowing that the others were in the plan; that there was a combination or conspiracy under Section 1 of the Sherman Act without the necessity of showing any intent; and that the Supreme Court of the United States had so held (R. 46-47).

Appellant's position as understood and summarized (without challenge) by counsel for appellees, was as follows (R. 64):

"As I listened to Mr. Steffen this morning, it seemed to me that he has ended up, taking everything that he has said and trying to judge its total effect by the assertion that a mere plurality of licenses with price-fixing provisions, observed and adhered to, is *per se* unlawful, and, therefore, there is nothing relevant or material which the defendants could possibly offer since it is admitted that licenses were executed, that they did have price fixing provisions, that there came a time when they were industry-wide and that the licensor fixed the prices and enforced its rights in that regard as best it could, and the licensees in the main observed the prices. . . ."

Upon that basis, it was only necessary for appellant to point to the admissions of appellees to show that there was no controversy as to any material fact. Appellees never denied the existence of the license agreements with price limitation adhered to by them but rested their defense in that respect upon the firm belief that they had a right to enter into the license agreements under the doctrine of the *General Electric* case.

When the District Court granted the motion for summary judgment on June 29, 1948, although there was no written opinion, it is clear upon the record that the motion was granted upon the theory that the Supreme Court had held that the plurality of patent licenses industry-wide with price fixing provisions adhered to by appellees with knowledge of the adherence of the others was *ipso facto* illegal as in violation of the Sherman Act notwithstanding the

assumed legality of each separate patent license. Judge Garrett said that it was his opinion that if everything could be testified to which was in the proffer of proof it would bring no change in the decision of the Supreme Court on the fundamental question involved; that he was unable to see any loophole through which there could be a conclusion different from that reached by the Supreme Court upon the fundamental question. Judge Jackson said that Judge Garrett's reasoning paralleled his (R. 102-103).

Upon that theory, notwithstanding the good faith of appellee companies in entering into the license agreements or adhering to the price provisions thereof or the assumed legality of each separate patent license, the District Court, in determining the fundamental question in the case, held that concert of action as aforesaid under the patent license agreements constituted a violation of the Sherman Act; that there was no controversy as to any material fact with respect thereto since appellees admitted the facts necessary to the determination.

When it came to the entry of the decree, notwithstanding appellant's position that it was asking for summary judgment on the basis of the plurality of license theory and that the other alleged abuses could be laid aside, appellant presented a decree on the theory that every charge contained in the complaint, including all issues in controversy, had been conclusively determined against appellees (R. 250-259). Appellant's position that it was entitled to judgment on the theory that all of the controversial issues of fact had been conclusively determined against appellees is untenable.

It is clear upon the present state of the record that the only facts which have been conclusively determined in the case are those admitted by appellees, i.e., that appellee com-



panies constituted all the competitors in the gypsum board industry in the eastern area of the United States as defined in the complaint, that they executed patent license agreements, industry-wide, with price fixing provisions, and that appellee companies, all the competitors in the gypsum board industry in that area, adhered to the prices, terms and conditions of sale of patented gypsum board under the license agreements with knowledge of the adherence of the others.

The judgment having been rendered upon the pleadings and the admitted facts as aforesaid, all other facts introduced by appellant to establish its *prima facie* case were open to contradiction by appellees. This is true as to all the evidence introduced against appellees upon the trial, including the declarations of alleged co-conspirators referred to by this Court in its opinion. Appellees not only had the right to directly contradict the evidence of appellant, but the right to show the circumstances under which the declarations or quasi admissions were made, the reasons for making the same or the purpose for which made (31 C. J. S. (Evidence), §§ 270, 379, 380). Wigmore, in his work on Evidence, with particular reference to his discussion on the probative value of such quasi admissions, points out that statements, written or oral, which are not estoppels or judicial admissions are in no sense final or conclusive and have no quality of conclusiveness and upon principle cannot have; that evidence of the remainder of any such utterance may be introduced to show the full and correct significance of the evidence offered; and that evidence of quasi admissions may be explained by the other party (Wigmore on Evidence (3d Ed.), Volume IV, §§ 1048-1058, 1059). It follows that no fact in the case may be regarded as conclusively determined against appellees upon the determina-



tion of the motion for summary judgment, except those facts necessary to the determination of the motion as above shown.

The District Court, upon the entry of its final decree on November 7, 1949, defined the full scope of its determination upon the motion for summary judgment in the following language (R. 189):

“The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act.”

That judgment as shown was affirmed by this Court. The only means used by appellees to carry out the conspiracy as stated consisted of the license agreements, industry-wide, with price fixing provisions adhered to by appellees with knowledge of the adherence of the others. It follows that any decree entered in the case should be framed, as it was, within the scope of the determination as stated.

## II

### **THE DISTRICT COURT'S EXERCISE OF DISCRETION IN FRAMING THE DECREE SHOULD NOT BE DISTURBED BY THIS COURT EXCEPT FOR A CLEAR ABUSE.**

In a proceeding of the kind here involved, as stated in appellant's brief (Br. p. 23), the District Court is vested with a wide range of discretion in molding the judgment to the exigencies of the particular case, and where the findings of violation are sustained on appeal the appellate

court will not recast the judgment except upon a showing of abuse of discretion. The trial court's exercise of this discretion will not be lightly disturbed (*Associated Press et al. v. United States*, 326 U. S. 1, 22 (1945); *United States v. Crescent Amusement Co., et al.*, 323 U. S. 173, 185 (1944)). It is well recognized that because the purpose of the decree is remedial, not punitive, a court must take care that a "decree be no more drastic than the facts of the case and the law demand" (*United States v. E. I. du Pont de Nemours & Company*, 188 Fed. 127, 153 (C. C. Del. 1911)) and bear a "fair relation to the issue which was heard and determined" (*NLRB v. Swift & Co.*, 108 F. (2d) 988, 990 (C. A. 7th, 1940)); and that a court "cannot issue a general injunction against all possible breaches of the law" (*Swift and Company v. United States*, 196 U. S. 375, 396 (1905)).

The cases cited by appellant do not support its contention that here there was "an abuse of discretion calling for modification of the judgment" of the District Court (Br. p. 24).

*Local 167 v. United States*, 291 U. S. 293 (1934) was an extreme case, as we shall hereinafter show, in which this Court refused to disturb the trial court's discretion in entering a broad decree.

This Court, in *Ethyl Gasoline Corporation, et al. v. United States*, 309 U. S. 436 (1940) stated that the trial court was bound to frame its decree to suppress the unlawful practices and take such reasonable measures as would preclude their revival, as appellant asserts (Br. p. 26), but it is equally clear that this Court recognized that the extent of the relief was largely in the discretion of the trial court.

Appellant (Br. p. 26) cites *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897) for the

proposition that the decree should not be limited to enjoining the specific illegal agreements but should also enjoin appellees from entering into or acting under any similar agreement in the future. As we shall later show, the decree entered herein is not so limited, but affords relief adequate to the occasion.

Appellant relies on *International Salt Co., Inc. v. United States*, 332 U. S. 392 (1947) (Br. p. 26), but this Court there took pains to say that "the framing of decrees should take place in the District rather than in the Appellate courts" and expressly pointed out that district courts "are vested with large discretion to model their judgments to fit the exigencies of the particular case" (332 U. S. 392, 400-401).

In *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409 (1945) this Court went on to say, immediately following the sentence quoted by appellant (Br. p. 27):

" . . . But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' . . ."

### III

#### **THE DISTRICT COURT'S DECREE GAVE APPELLANT ALL THE RELIEF TO WHICH IT WAS ENTITLED.**

Appellant asserted that because of the basis upon which the District Court framed its judgment, the usual reasons

for according great weight to the trial court's conclusions respecting relief are not applicable here (Br. p. 24). The District Court, as it was required to do upon the motion for summary judgment, determined the issues which were not in controversy and sustained the motion upon those issues. Notwithstanding counsel's argument to the contrary (Br. p. 24), the record shows clearly that the court believed that the relief should be measured by the whole illegal conduct of which appellees were found guilty.

The decree as entered (R. 185-191) adjudged at the outset that the appellee companies had acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and had monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Anti-Trust Act. The license agreements were adjudged unlawful and declared to be illegal, null and void. The appellee companies, their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting under or through them, were enjoined and restrained from further performance or enforcement of any of the provisions of the patent licenses or the price bulletins issued thereunder, from entering into or performing any agreement or understanding for the purpose or with the effect of continuing, revising or reinstating any monopolistic practice, and from entering into or performing any agreement or understanding in restraint of trade in the gypsum board industry among the several states in the eastern territory thereof by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof. Appellee United States Gypsum Company was required to grant to any applicant, within 90 days from the effective

date of the decree, non-exclusive licenses under the board patents upon royalties not to exceed those charged in the canceled license agreements and containing the ordinary provisions found in non-exclusive license contracts.

Appellant makes no attempt to set aside the adjudication, but retaining it, poses the questions whether or not the injunctive provisions of the decree should (a) prohibit appellees from acting in concert to fix prices in the gypsum board industry and from continuing pursuant to such price fixing agreements acts and practices which the appellees have used as a means for effecting price control and regimentation of trade in the gypsum board industry, (b) require appellee United States Gypsum Company to license its present and future gypsum board patents at reasonable royalty rates and upon other terms fair and reasonable to those licensed, (c) provide for visitorial powers in representatives of the Department of Justice (d) include the individual appellees, and (e) require appellees to pay all taxable costs (Br. p. 3).

The decree as entered by the District Court not only canceled the license agreements in their entirety but prohibited appellee companies from continuing the performance or enforcement of any of the provisions of the patent licenses and of the price bulletins issued thereunder, and from entering into any agreement of any kind with the effect of continuing, reviving or reinstating any such monopolistic practice, and from entering into any agreement of any kind by license agreements to fix, maintain or stabilize prices of gypsum board, or the terms and conditions of sale thereof. That certainly prohibited appellees from acting in concert to fix prices in the gypsum board industry, and from continuing, reviving, or reinstating any



price control under licenses in the gypsum board industry. The new licenses authorized by the District Court's decree (R. 164-185) were intended to and did leave the licensees in the same position they would have been if their licenses had contained no price-fixing or other objectionable provisions.

We shall show later why the adjudication of the violation should not include the individual defendants as requested by appellant, and that no visitorial powers in representatives of the Department of Justice should be included in the decree in a case like this.

Appellant seeks to recast the decree of the District Court, claiming that there is ample warrant for the recasting of the relief which it proposes (Br. p. 23). It asserts that the prohibitions of the judgment are not to be confined to the precise conduct held to have been unlawful and should embrace means used by appellees in achieving their illegal ends (Br. pp. 25-26). It is clear from an examination of the decree that the court did not merely prohibit the precise scheme used by appellees, but on the contrary sought to and did frame its decree so as to suppress the unlawful practices and preclude their revival.

It is first contended by appellant that the prohibition against further performance or enforcement of any of the provisions of the patent licenses including any patent bulletin issued thereunder is an unimportant addendum to the cancelation of appellees' existing license agreements (Br. p. 27). We do not subscribe to that statement. The provision speaks for itself.

Secondly, it is claimed that the prohibition of section (2) of Article V of the decree against entering into or performing any agreement or understanding for the purpose or



with the effect of continuing, reviving or reinstating any monopolistic practice is couched in such general terms that contempt proceedings would involve proof required to establish a substantive violation of the Sherman Act (Br. pp. 27-28). Of course, proof of an alleged violation would have to be made, but there could be no difficulty in determining whether an alleged violation was prohibited under the provision of the decree enjoining the continuation, reviving or reinstating of any monopolistic practice carried on under the license agreements. The prices, terms and conditions of sale adhered to under the licenses are not only admitted upon the record by appellees, but are contained in exhibits received in evidence in the case. The District Court, by the provision above complained of, made certain that there could be no continuation, revival or reinstatement of any price control under the licenses.

Thirdly, it is asserted that the prohibition against entering into or performing any agreement or understanding in restraint of trade and commerce in gypsum board by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof is limited to restraint of trade in the eastern United States in gypsum board which embodies an invention claimed in particular USG patents (Br. p. 28). In this connection appellant relies upon its Specification of Error No. 2 (Br. p. 16) which is the same as Assignment of Error No. 3 (R. 197), but changed to include the words "in the eastern United States". Appellant's whole case with respect to the patent licenses was premised upon the allegation that licenses industry-wide in the eastern area of the United States with price limitation adhered to by appellees constituted a violation of the Sherman Act. It selected the competitive area and de-

fixed it in its complaint (par. 20, R. 3), as the very basis of the charge that the entire gypsum board industry therein was licensed under the license agreements in question. If it were not so limited, the record would not support the charge of industry-wide price fixing.

We submit that there is no force to the contention that the court erred in confining the prohibition to the eastern area as alleged, and that no error was assigned by appellant with respect thereto.

The assertion that the provision applied only to gypsum board which embodies an invention claimed in particular USG patents, requires reference to the definitions of both "patents" and "gypsum board" in Article II of the decree to the effect that gypsum board meant plaster board or lath and wallboard made from gypsum and embodying any of the inventions or improvements set forth and claimed in any patents and applications described in the patent licenses and continuations, renewals, reissues, divisions and extensions thereof (R. 187). This in fact covered board embodying any one or more of all the inventions and improvements described in any of the patents or patent applications whether or not the patent had expired or a patent had issued upon the application. The description of the invention by reference to the license agreement was not intended to, nor did it, limit the board involved, to those unexpired patents of USG, as contended by counsel. Any question which might be entertained as to any such interpretation could easily be set at rest by eliminating the words "and embodying any of the inventions or improvements set forth and claimed in any of the patents" in the definition of gypsum board.

Not satisfied with its contentions first made with respect to the third prohibition, appellant asserted that an even more serious deficiency leaves appellees free to enter into price fixing agreements of any kind or variety provided that patent licenses are not the medium for price fixing and leaves appellees free to employ the specific practices by which they have implemented price control and trade regimentation (Br. p. 28). In this connection it was asserted that the judgment interposes no bar to the concerted adoption and enforcement of a host of rules designed to restrain price competition and stabilize prices by action similar to that condemned in *Sugar Institute, Inc. et al. v. United States*, 297 U. S. 553 (1936). That case affords no guide to the question raised here as the facts involved were quite different. The third prohibition of the District Court's decree specifically restrained any agreement or understanding by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof and the second prohibition as above shown enjoined the entering into or performance of any agreement or understanding continuing, reviving, or reinstating any monopolistic practice used in carrying out the conspiracy. The reference of counsel to a basing point system will have our attention when we come to the consideration of the provisions of appellant's suggested decree.

It is further contended by appellant that it is evident that the District Court believed that relief should be confined to the precise medium used by appellees in fixing prices and regimenting trade, namely, common acceptance of licenses containing price fixing provisions (Br. p. 29). We have shown before that this is an incorrect statement of the trial court's view. The trial court, as shown, did deter-

mine the violation and, contrary to appellant's statement, framed its decree so as to prohibit the unlawful practices or their continuation, revival or reinstatement in any form.

It is also asserted by appellant that appellees contended that price fixing through patent licenses was the single basis for summary judgment, and that the factual premises for any broader relief were put in issue by appellees' proffer of proof and must therefore be regarded as not proved for the purposes of summary judgment (Br. pp. 29-30). Our contention was that the court determined there was a violation of the Sherman Act based upon the admitted facts that the appellee companies entered into license agreements and that they adhered to the pricing and other provisions thereof and to the price bulletins issued thereunder fixing the minimum prices and terms and conditions of sale of patented gypsum board. Appellees admitted the documentary evidence consisting of the license agreements and the bulletins issued thereunder. The controversial questions in the case which were raised by the pleadings and which appellees offered to prove could afford no basis to support broader injunctive relief wholly outside the scope of the determination made by the District Court.

In appellant's statement of questions presented, its first and principal question was whether the judgment should prohibit appellees from acting in concert to fix prices in the gypsum board industry and from continuing, pursuant to such price fixing agreement, acts and practices which appellees have used as a means of effecting price control and regimentation of trade in the gypsum board industry (Br. pp. 2-3). As shown before, the District Court, upon the facts not in controversy, adjudged that the appellee companies acted in concert in restraint of trade and commerce

to fix, maintain and control the prices of gypsum-board and monopolized trade and commerce in the gypsum board industry and entered appropriate relief. It would appear that in this connection appellant is only saying that the District Court should have gone into greater detail in its decree.

It is contended that the proffer of proof does not qualify the force of appellant's original evidence because the proffer was not supported by affidavits (Br. p. 30). The proffer of proof was intended to and did inform the court of the proof which appellees expected to make upon the trial. It showed the controversial issues involved and was accepted by the court and both parties for that purpose. No objection was made to the proffer and no assignment of error was made with respect to it (R. 89-91, 96-97, 196-198).

It is further contended by appellant that once the basic price fixing conspiracy was proved, the relief to which appellant was entitled was not limited to an injunction against repetition of the precise details of the violation found (Br. p. 31). The complaint is that the judgment should bar appellees from using related or similar means for achieving the unlawful ends which the Court found and adjudged in this case, concerted fixing of prices and regulation of distribution in the gypsum industry. In this statement counsel is recurring to the contention made below that appellant is entitled to a decree upon the theory that controversial issues of fact were conclusively determined without giving appellees their day in court. The scope of the judgment in this case must be based, as it was, upon those issues of fact which were not in controversy and which, as shown, was the theory upon which appellant presented its motion and obtained summary judgment. All other issues of fact were,



as shown, laid aside by appellant as immaterial, and its acceptance of the judgment as entered forecloses any further trial of the issues which were in controversy. Upon granting the motion for summary judgment, the District Court, upon the facts not in controversy in the case, found that the appellees had acted in concert to fix, maintain and control the prices of *gypsum board* and monopolized trade and commerce in the *gypsum board industry* in violation of the Sherman Act. The finding in the decree is the only finding which could properly have been made upon the present state of the record. It gives, however, no basis for a decree to enjoin concerted fixing of prices and regulation of distribution in the *gypsum industry*, as suggested by appellant.

It is stated that through common agreements with USG, appellees have fixed gypsum board prices and terms of sale in minute detail and in pursuit of these ends they have concertedly engaged in many collateral activities (Br. p. 32). It is true that the record admittedly shows that in the gypsum board industry under the patent license agreements, the terms and conditions of sale were fixed. It is not true that in pursuit of these ends appellees concertedly engaged in many collateral activities and suppressed price competition in an entire industry, and there is no basis for such a finding upon the present state of the record.

It is further argued by appellant that if it is assumed that appellees believed that their acts were within the shelter of rights given by patent law, it is not a ground for narrow and restricted prohibitions (Br. pp. 32-33). It admits appellees are not to be penalized because of their mistaken belief, in the scope of their patent privileges, but asserts, on the other hand, that they are not entitled to

favored treatment. The District Court heard all of the evidence, all of the arguments of counsel, entertained the motion for summary judgment, and sustained the motion on the grounds above stated. That court, as the record amply shows, found that appellees in operating under the patent license agreements acted in good faith, relying upon the advice of their attorneys with respect to the holding of the court in *United States v. General Electric Company*, 272 U. S. 476 (1926) (FF 31, R. 4148); that they did no more than was approved by the Supreme Court in the *General Electric* case (FF 27, R. 4147) and which this Court, referring to the opinion of the District Court in sustaining the original motion of appellees to dismiss, said stemmed logically from its understanding of that case (333 U. S. 364, 389-390).

It is not a question of favored treatment. While good faith will not relieve a defendant from the charge of violating the Sherman Act, the conduct of the defendants, their intent, and the good faith in which they acted, are always matters properly to be considered by the court in exercising its discretion in determining what must necessarily be included in a decree to effectively prevent the continuance or recurrence of the violation being enjoined. They are inherent in the oft repeated principle that the decree should be drawn to meet the exigencies of the particular case.

The decree of the District Court in the exercise of its sound discretion under all the facts of the case sought to, and did, give full and adequate relief within the full scope of the determination made by it upon the motion for summary judgment. The decree, under these circumstances, should not be recast as counsel would have this Court do.

In *United States v. Masonite Corporation et al.*, 316 U. S. 265 (1942), the Court applied the concert of action

theory to a group of competitors operating under *del credere* agency contracts. The instant case is the companion case to *Masonite* applying the concert of action doctrine to patent licensing. The decree entered in the *Masonite* case following reversal by this Court, like the decree in this case, followed the general principle of canceling the offending contracts, with relief against further performance. New *del credere* agency contracts without the objectionable provisions were approved. For the convenience of the Court, we attach as an appendix to this brief a copy of the decree entered in the *Masonite* case.

#### IV

#### **APPELLANT'S PROPOSED RECASTING OF ARTICLE V OF THE DECREE IS UNJUSTIFIED AND UNWARRANTED.**

(a) *Price Fixing by Concerted Action.* Appellant states (Br. p. 34) that appellees should be expressly enjoined from fixing prices, by concert of action, as such concert of action is the epitome of appellees' offense. It is stated that the judgment should proscribe action of this kind and not merely prohibit price fixing through patent licenses—the particular instrumentality utilized to achieve that end (Br. p. 34). Of course, counsel could not mean just to enjoin against concert of action without more, but that is the way he would apply it. In this counsel refers to the opening paragraph of Article V of appellant's suggested decree (Br. pp. 68-69) wherein it proposes that appellee companies, their respective officers, etc., be, and each of them is, enjoined from entering into or performing any agreement or understanding to fix, maintain, stabilize or make uniform by patent license agreements or by other concerted action, the prices or terms or

conditions of sale of gypsum products. The language is so indefinite as to raise serious questions of construction. As the paragraph is written, a single company in its internal affairs or transactions with others could not safely conduct its lawful business. Nor could any single company enter into a patent license with price limitation, or in fact any other such arrangement, with a patentee for the production and sale of any patented gypsum product. What is meant by "concerted action" in such a provision is impossible of determination from the language used. Reference is made to the Supreme Court's injunction *pendente lite* issued on May 29, 1950, but we find nothing in that restraining order to support any such phrase as is used by appellant in the opening paragraph of said Article V.

Where the trial court has effectively enjoined appellees within the scope of the determination, there is no sound basis for recasting the decree merely because appellant desires greater relief than is necessary to meet the exigencies of the case.

(b) *Prices of Plaster and Miscellaneous Gypsum Products.* A fundamental point in appellant's suggested modification of Article V of the decree is its proposal that the injunctive provisions be extended to cover gypsum plaster, block and tile and Keene's cement, sometimes referred to as plaster and miscellaneous gypsum products. This it proposes to do by substituting the words "gypsum products" for the words "gypsum board" in Article V (Br. p. 35).

Such a contention is made notwithstanding appellant's apparent acceptance of the proposition that, in the light of the determination on its motion for summary judgment, the adjudication of restraint of trade by concerted action (Article III) should be limited to gypsum board.

As shown, the complaint herein charged appellees with conspiring to restrain trade in gypsum board, plaster and miscellaneous gypsum products (pars. 44, 45(c), *R.* 9-10). Specifically it was charged that, in addition to the agreements contained in the licenses, the parties thereto agreed among themselves to advance and stabilize the prices for plaster and miscellaneous gypsum products; and that they agreed to sell and did sell plaster and miscellaneous gypsum products on the basis of various terms and conditions of sale prescribed by USG for the sale of board (pars. 77, 103-104, *R.* 18, 27-28). Appellees' answers denied all of these charges (*R.* 284, 292) and there was no evidence whatsoever as to the prices, terms and conditions of sale at which plaster and miscellaneous gypsum products were sold or offered for sale.

The proffers of proof showed that appellees were prepared to prove that there was no agreement or understanding of any nature whatsoever with respect to the fixing or stabilizing of prices of plaster and miscellaneous gypsum products and that appellees did not by concerted action or otherwise raise, fix or stabilize such prices; that the prices for plaster and other unpatented products have at all times been highly competitive and were not in any way affected by the minimum prices established by licensor for the patented board; that the so-called rebate provisions of the price bulletins were not issued for the purpose, nor did they have the effect, of fixing or stabilizing the prices of such products; and that appellees, by complaints addressed to Board Survey or by any of its activities, did not fix or stabilize such prices (Offers of Proof Nos. 2, 52, 53, 58, 59; *R.* 145, 158, 159). Appellant's statement (*Br.* p. 36) that appellees' proffer of proof did not deny certain



comments in this Court's opinion on the prior appeal regarding plaster and Board Survey is inaccurate and unwarranted.

The trial court in its opinion, after a review of all the testimony, found not only that there was no understanding or agreement to fix prices of plaster or any unpatented gypsum product but that the price bulletin providing against indirect price-cutting on patented board by reducing the price of such products was but part of a larger provision concerning rebates and was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, nor did it have that effect. This Court, in rejecting the trial court's findings, mentioned only two items of evidence now relied upon by appellant, namely the bulletin provision and the complaints to Board Survey (333 U. S. at p. 399), from which it expressed the view that appellees had attempted to stabilize plaster prices. Certainly on the present state of the record this could only have referred to a *prima facie* showing, and it cannot be reasonably suggested that the Supreme Court thereby held that appellees would be precluded from introducing evidence to rebut the showing. It was not only a controversial issue between the parties but one which, as shown, appellant laid aside upon its motion for summary judgment and its acceptance of the judgment entered by the District Court on November 7, 1949.

It will be recalled that notwithstanding appellant's position that it was asking for summary judgment on the basis of the plurality of license theory and that the other alleged abuses could be laid aside, appellant, when it came to the entry of a decree, presented a decree which would have given it a favorable adjudication on every charge contained

in the complaint including all issues in controversy (R. 250). In this form of decree appellant had asked the court to adjudge, among other things, that appellees had contracted, combined and conspired to restrain commerce in "gypsum products" (Art. III, R. 252). The District Court refused to accept appellant's proposed decree but entered a decree of its own making wherein it was adjudged that the appellee companies had acted in concert in restraint of trade in gypsum board, which, as shown, is the adjudication this Court affirmed in its order of May 29, 1950.

Appellant originally included in its Assignment of Errors filed in this appeal (R. 196-198) the assignment that the court erred "in failing to adjudicate that the defendants have conspired to restrain interstate commerce in gypsum products" (Assignment No. 2), "in limiting the prohibitions of Article V(3) to restraints of trade "involving only gypsum board" (Assignment No. 3) and, if the court concluded that controverted questions of fact prevented entry of judgment on the whole case or for the relief requested, in not entering an order specifying the facts which it ascertained to be in dispute and directing the trial to proceed as to those facts" (Assignment No. 11).

Assignments of Error Nos. 2 and 11 have now been abandoned by appellant in its specification of errors to be urged (Br. pp. 16-18) and the portion of Assignment No. 3 referred to above has been modified to assert that the District Court erred in limiting the provisions of Article V(3) to restraints of trade "involving only 'gypsum board' in the eastern United States" (Item 2, Br. p. 16). Moreover, appellant no longer urges that Article III of the decree should adjudicate that appellees restrained trade in "gypsum products" but now limits its proposed adjudication to

gypsum board (Br. p. 68). In other words, although appellant concedes the propriety of limiting the adjudication in Article III to gypsum board, it is contending that there was an abuse of discretion warranting the recasting of the decree because the District Court did not extend the injunctive provisions to plaster and miscellaneous gypsum products as well as to board.

In *Local 167 v. United States*, 291 U. S. 293 (1934) the evidence clearly established a widespread conspiracy to restrain and monopolize commerce in live and dressed poultry throughout the metropolitan New York area. Appellants objected to a provision in the decree enjoining them from using their offices or positions in Local 167 for the purpose of coercing marketmen to buy poultry, poultry feed or other commodities necessary to the poultry business. The evidence showed that delegates of the unions coerced marketmen to use coops of a particular company which had sought to secure a monopoly of such facilities. The Court held that the lack of specific evidence that coercion had been practiced or threatened in respect of every detail or commodity was no adequate ground for striking out the clause or for limiting it to a mere specification of the coops. The Court said that having been guilty of coercion in respect of the coops in which poultry was kept and fed appellants may not complain if the injunction binds generally as to related commodities, including feed and the like. It is not surprising that this Court did not see fit to consider the trial court's injunction an abuse of discretion under the circumstances, but rather said that, regard being had to the "evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as un-

necessary or without warrant" (p. 299). The facts of that case are not at all applicable to the question involved in this case.

The only other case cited by appellant in support of its contention that Article V should be recast to cover plaster and miscellaneous gypsum products is *United States v. Crescent Amusement Co. et al.*, 323 U. S. 173 (1944) (Br. p. 38). That was a case against certain motion picture exhibitors, the crux of which was the use of the buying power of the combination of exhibitors for the purpose of eliminating competition and the court found that there was ample evidence of the use of defendants' combined power for the purpose either of restricting the ability of competitors to license films or of eliminating competition by acquiring the competitors' property or otherwise. The decree enjoined the defendant exhibitors from making franchises designed to maintain their theatre monopolies and prevent independent theatres from competing with them and from entering into "any similar combinations and conspiracies for similar purposes and objects" (323 U. S. at p. 187). Appellant states that this Court sustained the injunction against entering into "any similar combinations and conspiracies having similar purposes and objects" over defendants' objection (Br. p. 38). The objection to the decree was not that it extended the relief beyond the scope of the adjudication, but rather that the injunctive provisions should be directed against distributors rather than exhibitors (323 U. S. at p. 187). Moreover, the District Court in this case has not merely prohibited the further performance of the license contracts which were found to have violated the antitrust laws, but has extended the injunctive provisions to prohibit any similar restraint of trade. The court in *Cres-*

*cent Amusement Co.* recognized the general rule which is here applicable, stating (p. 185):

"... We recognize however that there is a wide range of discretion in the District Court to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion. . . ."

The authorities amply support the action of the trial court in limiting the injunctive provisions to gypsum board. Thus, in *Swift and Company v. United States*, 196 U. S. 375 (1905), the lower court had enjoined defendants from restraining interstate commerce by the illegal practices there established, "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid" (p. 393, fn. 1). In reviewing the appropriateness of the decree, the court held that the words of the injunction "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid" should be stricken out, stating "We cannot issue a general injunction against all possible breaches of the law" (p. 396) and "the words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid" (p. 401).

In *Associated Press et al. v. United States*, 326 U. S. 1 (1945), the trial court found that certain by-laws and contractual arrangements of Associated Press were in violation of the Sherman Act and entered the injunctive relief which in its judgment was sufficient to correct the violation of the law, but declined to extend the injunctive provisions to certain by-laws and agreements which it believed to be lawful, in the absence of the restrictive membership agreements



which it had enjoined. The Government appealed and sought to have the decree broadened so as permanently to enjoin observance of the Canadian Press contract and all of the challenged by-laws. It also suggested certain specific items which should be added to the decree to assure the complete eradication of AP's discrimination against competitors of its members. In denying the Government's appeal, this Court said (p. 22):

"The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court. *United States v. Crescent Amusement Co., supra*. A full exploration of facts is usually necessary in order, properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented we are unable to say that the court's decree should have gone further than it did. Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."

The record in this case requires a similar disposition of appellant's effort to broaden the injunctive provisions of the judgment of November 9, 1949.

(c) *The Pacific Coast*. Appellant urges a recasting of the decree to extend the injunctive provisions to appellees'

operations on the Pacific Coast (Br. pp. 34-35), obviously an afterthought for the point was not specifically raised in its assignment of errors (R. 196-198) but was first mentioned in the specification of errors to be urged (Br. p. 16).

The fact of the matter is that appellant, as shown, deliberately premised its complaint upon an alleged conspiracy in restraint of trade in the eastern area of the United States as therein defined (pars. 20, 45, R. 3, 10), confined its proof to that area, and moved for summary judgment on the ground of the industry-wide licensing with price fixing, which it could only claim on that premise. Such a limitation was necessary for appellant's purpose of claiming industry-wide licensing and restraints of trade and monopolization throughout the entire gypsum board industry. There is no evidence whatsoever in the record regarding the operations of the gypsum board industry on the Pacific Coast, except that it is clear that the minimum price bulletins were expressly made inapplicable to sales of gypsum board for shipment to or delivery in that area (R. 90). There is no basis for appellant's speculations with respect to the operations of the gypsum board industry on the Pacific Coast (Br. p. 35).

This Court based its decision with respect to concert of action in an entire industry upon the fact that the licenses were industry-wide in the competitive area so selected by appellant for the purpose of its complaint. Counsel states that the situation with respect to the inclusion of the prohibition might be different if any real significance attached to the geographical scope of the trade restraints charged and found (Br. p. 35). That there is such significance appears from the complaint, the evidence, and this Court's opinion where concert of action among all the competitors

in the described area in adhering to the price provisions of the license agreements was the very foundation of the concert of action theory advanced by the Court in its opinion.

Certainly the District Court's limitation of the injunctive provisions to the scope of appellant's case was not an abuse of discretion in framing a decree to meet the exigencies of the particular case.

(d) *Resale Price Fixing.* An illustration of the wisdom of the rule that the trial court should be given broad discretion in framing its decree and that the exercise of such discretion should not be lightly disturbed in the appellate court is presented by an addition contained in appellant's draft of decree which it does not choose to mention in its brief. Thus, appellant would have the injunctive price fixing provision apply to gypsum products sold or offered for sale "or resale" (Art. V, Br. p. 69).

In its complaint in the instant case appellant charged that as part of the alleged conspiracy to restrain trade in gypsum board appellees had concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by appellee companies, gypsum board purchased from them (pars. 45(e), 108-11, R. 10, 29). These charges were denied in the appellees' answers (R. 275, 293), and the proffer of proof showed that the charges would be completely disproved (No. 60, R. 159). The District Court in its findings of fact entered at the time of its dismissal of the case in 1946 found that these charges were wholly unsupported by the evidence (FF 104, 116, R. 4165-4166). This Court in reversing the order of dismissal did not pass upon this question nor did it set aside these findings (333 U. S. 364, 386, 399).

Notwithstanding the record, appellant would endeavor to obtain, by the insertion of two words "or resale" in its proposed Article V, injunctive provisions which have no basis whatsoever as far as plaster and miscellaneous gypsum products are concerned and which would only be appropriate as to gypsum board if appellant had been able to establish the charge and had obtained an adjudication that appellees had illegally restrained resale prices of gypsum board, as charged in its complaint.

(e) *Enjoining Specific Practices.* Appellant urges a recasting of the decree in order to add prohibitions against specific practices it contends were used in fixing and controlling prices in the gypsum board industry (Br. pp. 38-43). The proposals parallel similar provisions which appellant submitted to the District Court and which were before that court when it framed its decree (Br. p. 15, fn. 10).

The District Court rejected appellant's suggested specification of practices and covered the point in a direct, simple and effective way by enjoining and restraining defendants from "the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder" (Art. V(1), R. 189). A brief consideration of the point will suffice to show that the District Court's method of handling the matter was entirely appropriate and that its discretion in this regard should not be disturbed merely because it did not choose to accept appellant's proposals.

As appears from appellant's brief, the effort to include the specific practices referred to in its proposed Article V(1-5) (Br. pp. 62-69) is based upon matters which allegedly were included in the license bulletins issued by the

licensor in the exercise of its reserved right to fix the minimum price at which the licensees might sell the patented board. That such details are necessary and inherent in the fixing of a price may be illustrated by reference to the license bulletins which were issued by the licensor in the *General Electric case* (R. 3987-3990) and to the pronouncements of the Bituminous Coal Authority when called upon to fix prices in the bituminous coal industry (see Federal Register, 1939, Vol. 4, pp. 2958-3126). Moreover, appellees offered to prove that all provisions of the price bulletins with respect to the terms and conditions of sale had direct relation to the prices fixed by USG and that such provisions were not promulgated for the purpose or with the effect of regimenting the industry but solely for the purpose of defining the minimum price fixed by the licensor (Offer of Proof No. 51, R. 157).

When the patent licenses and the price bulletins are stricken down and the appellee companies, their officers and representatives are enjoined from enforcing or performing any of the provisions of the licenses, including the price bulletins, appellees have been effectively restrained as we have hereinabove shown.

*Referring to subparagraphs 1 and 2 of Article V of its suggested decree*, appellant asserts that appellees should be enjoined from making uniform the kinds of gypsum products or the method of manufacturing, selling, packaging, shipping, delivering or distributing such products. Appellant seeks to support these provisions by referring to certain language of this Court in describing the method of pricing gypsum board (Br. pp. 40-41). As shown, the matters referred to all have to do with price and are amply covered by the prohibitions of the District Court's decree.



There are other impelling reasons why these provisions of appellant's proposed decree are objectionable and improper. They attempt to place sweeping restrictions upon every activity of the appellee companies in the manufacture, sale and distribution of gypsum board, plaster and miscellaneous gypsum products. The provisions are so vague and general that the appellee companies could not safely work under them in the ordinary conduct of their respective businesses. Furthermore, these companies serve the building industry and the methods of production and distribution of their products are largely influenced by the requirements of that industry. To illustrate, the sizes of all building materials fastened to walls of buildings normally follow standard measurements in building construction and gypsum board must follow the same pattern.

Although the provisions of appellant's proposed Article V(1) and (2) are made applicable to other gypsum products, they have reference to charges limited to gypsum board. The complaint specifically charged that appellees had restrained and monopolized the manufacture and distribution of gypsum products by concertedly standardizing gypsum board and its method of production, by limiting the manufacture of board to uniform methods and by producing only uniform kinds of board for the purpose and with the effect of eliminating competition (pars. 45(b), 77(a), 93; *R.* 10, 18-19, 25). There was no charge in the complaint of alleged efforts to standardize plaster and miscellaneous gypsum products.

The answers denied all of these charges (*R.* 284, 290) and appellees offered to substantiate their contentions by proving that there was no agreement or understanding that the production of open-edge board, No. 2 board or seconds would be discontinued, that each appellee was at all times

free to make and sell such board, and further that, the discontinuance of the manufacture of open-edge board was due entirely to economic reasons. Appellees further offered to show the reason for charging royalties on all boards for the privilege of using USG's patents and to prove that such provisions were not inserted for the purpose of eliminating the production of unpatented board nor did they have that effect (Offers of Proof Nos. 46, 54, 55; R. 156, 158).

On the prior appeal, this Court, in considering the trial court's findings of fact as to these charges, referred only to the elimination of open-edge board and was apparently largely influenced in its rejection of the findings by the royalty provision contained in the licenses (333 U. S. at pp. 396-397). But, as shown, appellees offered to prove the economic reasons for those royalty provisions and to establish that they were not included for the purpose or with the effect of eliminating the production of open-edge or any other type of board. There is nothing illegal *per se* in measuring royalties for the privilege of using licensor's patents on patent-free products.

Under the circumstances, it would obviously have been improper for the District Court to have attempted, on appellant's motion for summary judgment, to make an adjudication on its standardization charges, and it did not purport to do so. Similarly, it would be improper to include injunctive provisions which would be appropriate only if such charges had been proved. Recognizing that the questions with respect to standardization were confined to certain provisions of the license bulletins, the District Court properly took appropriate corrective measures by striking down the license bulletins and enjoining any further performance or enforcement thereof.

Referring to subparagraphs 3 and 4 of Article V of its suggested decree, appellant asserts that appellees should be enjoined from agreeing to any basis for classifying customers (Br. p. 41). This has reference to the charge that appellees eliminated jobbers.

The complaint charged appellees with concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products through jobbers in the eastern area (pars. 45(d), 94, 95; R. 10, 25-26). These charges were all denied in appellees' answers (R. 275, 290), and appellees offered to prove that there was no agreement or understanding among them or any of them to eliminate jobbers or to discontinue the jobber discount (Offers of Proof Nos. 56, 57; R. 158-159).

There was no evidence whatsoever as to the alleged elimination of jobbers of plaster and miscellaneous gypsum products. The trial court so found (FF 103, R. 4164), and no error was assigned to that finding on the prior appeal (R. 4178-4186).

Thus the matter has reference only to gypsum board, as to which appellant did establish that in 1930 USG issued a license bulletin eliminating the jobbers' discount on sales of patented board. This Court in its opinion on the prior appeal expressed the view that the license bulletin referred to had the effect of eliminating a class of jobbers as that term was defined in the license agreements (333 U. S. at pp. 397-398).

What has been said with respect to standardization is equally true with respect to the matter of jobbers in that the injunctive provisions against further performance or enforcement of any of the provisions of the licenses or any license bulletin issued thereunder give appellant adequate

relief and all that it is entitled to on the adjudication which has been made.

*Referring to subparagraph 5 of Article V of its suggested decree*, appellant would insert a specific provision with respect to agreeing upon or adhering to any system of selling or quoting gypsum products at prices calculated or determined pursuant to a basing point delivered price system or any other plan or system which results in identical prices or price quotations at given points of sale or quotation by appellees using such plan or system (Br. pp. 42, 69).

This was not a basing point case and no evidence was introduced such as should properly be before any court attempting to adjudicate as to the validity of the method of pricing being used in an industry. There was no charge in the complaint specifically directed to an alleged use of a basing point method of pricing in the gypsum board industry, the only reference to the matter being in the paragraph in which it was averred that the licensor had issued license bulletins establishing the minimum prices on gypsum board sold to dealers "f.o.b. specified basing points" (par. 91(a), R. 23). In their answer these appellees denied that the complaint properly described the provisions of the minimum price bulletins (par. 76, R. 290).

The license bulletins introduced in evidence showed that the minimum price for the patented gypsum board was established as the lowest combination of mill price and rail freight from mill to destination (R. 89). This method of pricing was one which had been prevalent in the gypsum industry for many years antedating the issuance of the first license bulletin (R. 2908-2909). It was not established by the license bulletins, but licensor, in stating the minimum price, merely used the method of pricing as it then existed.

It would be eminently unfair and improper under these circumstances to attempt in the decree to make this a basing point case by arbitrarily designating or classifying as a basing point system the method of pricing disclosed by the bulletins. The only witness at the trial who was interrogated about it said that the pricing system in the gypsum board industry was the very opposite of the basing point system; that the mill base prices were extended to all mills; and that it was really only a freight equalization method of pricing which resulted in the customer always getting the lowest possible price no matter from whom he bought (R. 2909). It would be equally unfair and improper to enjoin any method of pricing in the gypsum board industry with no evidence whatsoever of the facts necessary to an intelligent adjudication of the matter. If appellee companies are to be questioned as to their method of pricing, they should be afforded a full hearing for the presentation of all pertinent matters bearing upon their pricing practices and should not be called upon to defend themselves in a summary hearing for an alleged contempt of court.

*Referring to subparagraph 6 of Article V of its suggested decree*, appellant requests (Br. pp. 42-43) a prohibition against certain activities. That prohibition is clearly suggested in view of Board Survey, Inc., which was formed and used by the licensor solely to assist it in bringing about compliance with the licenses and the license bulletins and which was abandoned in 1937, three years before the complaint herein was filed (R. 2841; Offer of Proof No. 53, R. 158). Obviously, there is no occasion or justification for such a provision in the decree.



The contentions of appellant with respect to including specific injunctive provisions in the decree in this case are not supported by *Federal Trade Commission v. Cement Institute, et al.*, 333 U. S. 683 (1948) and *Sugar Institute, Inc. et al. v. United States*, 297 U. S. 553 (1936) referred to by appellant (Br. pp. 38-40). The *Cement Institute* case was decided by the Federal Trade Commission after an exhaustive trial and, upon the voluminous record presented, this Court affirmed the detailed findings of the Commission, showing restraint of trade. Appellant's comments (Br. p. 38, fn. 17) regarding the preamble preceding the specific prohibitions of the cease and desist order are irrelevant. The objection there made to the specific paragraphs had nothing to do with the question whether or not a lower tribunal had abused its discretion in framing its decree without such specificity (333 U. S. at pp. 727-728).

The *Sugar Institute* case involved charges of restraints of trade carried on through an industry trade association. After a full hearing on the evidence submitted by plaintiff and defendants, the trial court entered 218 findings of fact establishing the alleged restraints through the association activities, which findings this Court found were all amply supported by the evidence in the record. The trial court in the exercise of its discretion determined not to abolish the Institute but, rather, to permit the Institute to continue its activities subject to specific prohibitions as to the scope of its operations. The fact that there were 45 specific paragraphs in the injunctive portion of the decree, of which this Court rejected only three, is wholly immaterial to the point under consideration here.

## V

**APPELLANT'S PROPOSED RECASTING OF ARTICLE VI OF THE DECREE IS UNJUSTIFIED AND UNWARRANTED.**

Appellant seeks (Br. pp. 43-57) a recasting of Article VI of the decree so as to compel appellee United States Gypsum Company to grant licenses to any applicant on any, some or all of its gypsum board patents now or hereafter owned, subject to the provision that after five years from the effective date of the judgment it may apply to the District Court for an order excluding from such obligation patents acquired subsequent thereto. Appellant's proposed Article VI (Br. pp. 70-73) would permit recovery of reasonable royalties, the amount thereof to be fixed by the District Court if the parties are unable to reach an agreement with respect thereto. It would also impose various restrictions as to the license provisions and would include a provision that the judgment should not be construed either as preventing any applicant for a license from attacking the validity or the scope of any patent of USG or as importing any validity or value to any such patent.

Compulsory licensing is an extreme and drastic remedy which has been imposed upon defendants in but only a few contested cases.\* Never has a court imposed compulsory

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\*The fact that a larger number of consent decrees have provided for compulsory licensing at a reasonable royalty (Br. p. 49, fn. 28) does not afford any precedent for its imposition in the instant case, for there is no way for this Court to know the underlying facts which prompted the parties to enter into such decrees.

licensing upon a patent owner in a case like this.\* The only basis upon which a court could include in a decree a provision for compulsory licensing at reasonable royalties is that it is necessary to do so to prevent further continuance of the violation enjoined in the decree. It must be a necessary aid to the injunctive provisions of the decree.

This Court has sustained such a decree where the trial court concluded that it was required to preclude the resumption of deliberate, unlawful practices because of a persistent manifestation by the defendants of a purpose to violate the anti-trust act. In other words, after a careful analysis and understanding of all the facts and circumstances in such cases, this Court has agreed that the requirement for compulsory licensing was necessary to prevent further violations of the act in aid of the injunctive provisions of the decree. It has never, to our knowledge, imposed compulsory licensing upon a patentee where such an imposition was not first found to be necessary by the trial court in the exercise of its discretion in framing the decree. Moreover, this Court has never permitted any blanket decree for compulsory licensing, but on the contrary has limited the requirement to meet the exigencies of the particular case and limited the patents to which it was applicable. It is not surprising that this Court has placed these restrictions on any such decretal provision, for to require compulsory licensing at reasonable royalties for any reason other than that stated above is but to impose penalties in the guise of preventing future violations.

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\*For the reasons hereinafter stated in this Point V of our brief, we do not regard Article VI of the District Court's decree as providing for compulsory licensing.

In support of its position appellant relies upon two cases: *Hartford-Empire Co., et al. v. United States*, 323 U. S. 380 (1945), and *United States v. National Lead Co., et al.*, 332 U. S. 319 (1947) (Br. p. 45). In the *Hartford-Empire* case the power of the flagrant conspiracy there found, after an extended trial and with full opportunity for the defendants to be heard, was attained by aggregating the competing patents belonging to several members of the conspiracy, placing them together in a patent pool, and vesting in one member of the conspiracy the sole right to grant licenses thereunder. It was proved, as this Court pointed out in its opinion, that in granting licenses limitations were not only made as to the area in which the licensee might operate and the quantity which might be produced under the license, but often as a result of conferences between the conspirators, licenses were refused "to prevent overstocking the glassware market and to 'stabilize' the prices at which such ware was sold" (323 U. S. at p. 398). It is understandable that in that situation it might be deemed necessary to require compulsory licensing in order to break up the monopoly that had been illegally acquired. Even so, although this Court affirmed the compulsory licensing provided for in the decree of the lower court, it saw fit to place definite limitations upon the scope of its operation (323 U. S. at pp. 418-419).

In the *National Lead* case there was also involved a cross-licensing arrangement between National Lead Company and Du Pont. Actually there was not any issue made before this Court with respect to the propriety of compulsory licensing, the issue being whether there should be compulsory licensing on a royalty-free basis or on a reasonable royalty basis, and this Court sustained the trial court's exercise of discretion in providing that reasonable royalties should be required for the use of any of the patents there

involved. In that connection this Court approved the provision in the decree that the licensor at its option could condition the grant of license to any applicant upon the requirement that the applicant grant a reciprocal license under any of its patents (332 U. S. at p. 359).

Certainly neither of these cases is authority for the proposition that this Court should disturb the exercise of the trial court's discretion in its framing of Article VI of the decree.

In this case appellant originally founded its charges upon an alleged agreement or understanding among appellees to raise and fix at arbitrary and noncompetitive levels the prices of gypsum board and plaster and other miscellaneous gypsum products, carried out in part under the guise of numerous license agreements entered into merely to give color of legality to the combination, which, as shown, appellant wholly failed to prove. The motion for summary judgment was decided upon a new theory, that adherence by appellees in an entire industry to the minimum price provisions of the patent license contracts, with knowledge of the adherence of others, violates the Sherman Act.

Moreover, there is no evidence in the case of any intent of appellees to violate the Sherman Act but on the contrary the record shows that they believed and were advised by their counsel that they had a right to enter into the patent license contracts and adhere to the price provisions therein (FF 31, R. 4148). Accordingly, the adjudication which appellant sought and obtained by its motion for summary judgment was premised on the concert of action theory arising out of the simple fact of the plurality of licenses with price limitation, and was not based upon the charges of bad faith and the use of patent licenses as a guise for covering illegal purposes which appellant originally charged.



It further appears that at the date of the decree of the District Court all the patents in the main license agreements had expired except the three Roos bubble patents which will expire in 1952 and 1954 (R. 100, 104, 109); that price control under the licenses had ceased voluntarily upon the expiration of the Haggerty starch patent (R. 64) on July 8, 1941 (FF 19, R. 4143); and that there was no evidence that any board manufacturer had ever been refused a license by USG upon request therefor.

We submit that it is obvious that the District Court was unimpressed with appellant's contention that this is the type of case in which compulsory licensing is necessary to prevent further violations of the Act in aid of the injunctive provisions of the decree. Rather, it believed that the licensees, having acted in good faith in reliance upon the *General Electric* case, should not be deprived of the opportunity to continue to use such of USG's patents, under which they were then licensed, as they might desire to use after the termination of the then outstanding licenses by order of the court. Accordingly, the District Court was seeking to find a suitable means of assuring the licensees of the continued use of such patents under forms of license that would be free from the objectionable provisions contained in the licenses which the court was canceling.

That was the underlying purpose and objective of Article VI of the decree entered by the District Court, although it is true that the opportunity for obtaining such a license was by the provisions of the decree open to any applicant, whether or not it had theretofore been a licensee of USG (R. 189).

Having in mind the determination of the District Court in this regard, it is obvious that the provisions of Article VI

of its decree were not only proper but were entirely appropriate to meet the objectives of the court.

Appellant has not presented any good reason why USG's present and future gypsum board patents should be burdened with the requirement that USG grant licenses thereunder to any applicant. Rather it states (Br. pp. 45-46) that under the circumstances it is unnecessary for the Government to contend that wherever a defendant's violation of the Sherman Act has involved misuse of patents compulsory patent licensing is a necessary element of relief. It states (Br. p. 46) that USG is the dominant factor in the industry, and proceeds to argue for a drastic compulsory licensing provision to punish appellee USG without any showing that it is necessary to prevent further continuance of the violation enjoined.

Appellant states (Br. p. 46) that by means of its patents USG has maintained rigid control over the prices and terms of sale of virtually all gypsum board but, as shown, at the time that the District Court was considering the framing of its decree, USG had not exercised its reserved right to fix the licensees' minimum price since July 8, 1941, a period of approximately eight and a half years.

Appellant states (Br. p. 46) that if the judgment allows USG freedom to license or not to license its patents, it will remain clothed with power to refuse licenses and to use the threat of costly patent litigation to exclude others from the industry, but there is nothing in the record to indicate that USG ever refused a license to any board manufacturer requesting it.

Counsel asserted that it has been USG's consistent policy to license its patents only if the licensee would accept

a license giving USG the right to fix the licensee's sales prices. This is an inaccurate statement of the fact. The fact is that at the end of protracted but successful litigation to stop infringement of its patents USG took the position that it would not grant a license to any infringer except upon terms which included payment of damages for past infringement, payment of royalties for the use of its patents and reservation by licensor of the right to fix minimum prices at which patented board might be sold. From this it is urged that compulsory licensing is required as it may not be assumed that a violator of the anti-trust laws will relinquish the fruits of his violation more completely than the court requires him to do. That a patentee has asserted the rights, which the legal profession for years understood to be inherent in the ownership of a patent under the doctrine of the *General Electric* case, furnishes no support for appellant's argument that it must therefore be assumed that the patentee will not respect the injunctive order entered herein.

Regarding appellant's statement (Br. p. 47) that neither USG nor the court below has denied the need for compulsory licensing of some sort, appellant knows that USG has consistently denied the propriety of any compulsory licensing provision in this case. As shown, the underlying purpose of Article VI in the decree of the District Court was to afford the licensees an opportunity to replace their canceled licenses with an unobjectionable form of license under the licensed patents. That was the sole reason for the inclusion of a similar provision in the form of judgment submitted by USG (R. 281-282, 358).

The compulsory licensing requirement proposed by appellant runs for all time except for the provision shifting to USG the burden of attempting to obtain relief from the provision after five years. The decree which was entered following this Court's decision in *U. S. v. Line Material Co. et al.*, 333 U. S. 287 (1948), referred to by appellant (Br. pp. 54, 75) did not require compulsory licensing under any patent issued on inventions made subsequent to March 24, 1944, a date substantially before the date of the filing of the complaint in that case. Incidentally, the provision for compulsory licensing in that case was not contested by the patentee.

Appellant urges (Br. pp. 50-54) the necessity for the provisions contained in its proposed revision of Article VI to the effect that if the parties are unable to agree upon a reasonable rate of royalty then the matter is to be referred to the court for determination. No licensee has complained or objected to the royalty rates authorized in the District Court's decree. That court having spent a vast amount of time in the trial and consideration of the case and being thoroughly familiar with the facts, saw fit to determine in advance the royalty rates which it deemed reasonable and approved those rates upon the entry of the decree, thus avoiding the time and expense of the court and parties in subsequently submitting the matter to the court.

In support of its proposed Article VI appellant dwells at length on its requirement that "royalties may not be imposed upon or measured by patent-free products, processes or uses" (Br. 52-53). Counsel does not refer to the forms of licenses approved by the District Court. These licenses do not require the licensee to pay any royalty unless it uses

the licensed patent in that they expressly provide for the payment of royalties measured only by sales of gypsum board "covered under any of the processes or embodying any of the inventions covered by said patents" (R. 166).

Appellant prefers (Br. pp. 55-56) its provision for inspection of the licensees' books to the provision contained in the licenses approved by the court. The license provision approved by the District Court contains the customary provisions calling for monthly reports from the licensee of sales of the patented board, accompanied by the royalties due, and giving the licensor or its duly authorized representative the right to inspect the books of account and records of the licensee showing the quantity of patented gypsum board manufactured and sold under the license, together with the licensee's selling price thereof (R. 166). Such records are essential to a determination of the royalties payable. The inspection clause of the approved forms of license also contains a proviso that the licensee at any time may require the examination to be made by a certified public accountant rather than by the licensor (R. 167). It is to be noted that these reports and the inspection refer to past transactions.

Nor is there any occasion for paragraph 5 of proposed Article VI (Br., p. 72). Thereby appellant seeks to constitute the court below a special forum for the hearing, at any time in the future, of any prospective licensee under any of the board patents of USG, who may find it convenient, before taking a license, to attack the validity or scope of such patent or patents. Such a provision is as objectionable as one that would permit a licensee to question the validity of a licensed patent and is entirely unneces-



sary. Obviously no one is under any compulsion to take a license from USG, or from any other patentee; and, in a proper proceeding, an alleged infringer would be entitled to attack both the validity and scope of whatever patent or patents might be in question. Besides being unnecessary, such a provision would be wholly unfair to USG in that it might very well invite irresponsible litigation.

It is not entirely clear from Article VI (5) of appellant's proposed judgment whether it be intended that a licensee of USG shall share the privilege of an applicant for a license to attack the validity of the licensed patents. If so, the provision is contrary to the holding of the decided cases that a licensee under a patent license agreement without price limitation may not challenge the validity of a licensed patent.

It would also be improper for the decree to contain, in accordance with appellant's proposal (Art. VI, (5)), a provision to the effect that the judgment shall not be construed as importing any validity to any patent of USG. Equally objectionable, if not more so, is the suggested provision that the judgment shall not be construed as importing any "value" to any patent of USG (Art. VI (5)). The judgment does not import either validity or invalidity, or value or lack of value.

## VI

**THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ACCORD VISITORIAL RIGHTS TO THE DEPARTMENT OF JUSTICE, IN REFUSING TO INCLUDE THE INDIVIDUAL APPELLEES IN ITS ADJUDICATION OF VIOLATION OF THE SHERMAN ACT, AND IN REFUSING TO ASSESS ALL COSTS AGAINST APPELLEES.**

After stating the two principal questions presented by this appeal, appellant sets forth three additional questions for this Court's consideration: (a) whether the decree should have included a provision giving representatives of the Department of Justice the right to inspect the books and records of the appellee companies relating to matters contained in the judgment and to interview their officers and employees regarding such matters; (b) whether the adjudication of violation of the Sherman Act contained in Article III of the decree should include the individual appellees as well as the appellee companies; and (c) whether the decree should assess all of the taxable costs against appellees or only 50% thereof (Br. pp. 2-3). We respectfully submit that a consideration of these three questions will show that appellant's contentions with respect to them are without merit and should be rejected by this Court.

(a) *Visitorial Powers.* Appellant urges that there was an abuse of discretion in the trial court's refusal to include in its decree appellant's proposed Article VIII giving representatives of the Department of Justice the right to inspect books and records of the corporate appellees relating to matters contained in the judgment and to interview their officers and agents (Br. pp. 57-59).

There is no question but that such a provision is a drastic one. There is nothing in the United States Code relating to monopolies and combinations in restraint of trade which makes provision for such broad visitorial powers. Without statutory authority, United States officials could not require a corporation to submit to such an examination without a search warrant. It is true that this Court in *United States v. Bausch & Lomb Optical Co., et al.*, 321 U. S. 707 (1944), concluded that inclusion of such a provision in an equity decree as against corporations was within the power and discretion of the trial court, since the Fifth Amendment does not protect a corporation against self-incrimination through compulsory production of its papers. Nevertheless this Court there clearly indicated that the inclusion of such a provision was not to be loosely or automatically made. This Court sustained the inclusion of such a provision in the decree in that case upon the legal proposition that if the trial court in the exercise of its discretion found that it was reasonably necessary to wipe out the illegal distribution system, there was no constitutional objection to the employment by equity of this method; that the circumstances of each case must control the breadth of the order; and that under the circumstances of that case this Court could not say that the inclusion of the visitorial right in the Department of Justice was beyond the discretion of the trial judge (321 U. S. at pp. 724-728). There is nothing in this case to require any such action, and the District Court so found.

What has been said with respect to the principles laid down in *Bausch & Lomb* applies equally to each of the other cases cited by appellant. The cases in which no objection was made in this Court to such a provision, or if made was

waived by the defendants, afford no precedent for appellant's contentions that the District Court's refusal to include such a provision in a case like this was an abuse of its discretion. We know of no case, and the appellant certainly cites none, where this Court has held that it was an abuse of discretion for the trial court to refuse to incorporate such a provision in the decree which it framed. As shown, provisions of consent decrees are entitled to no weight in a contested matter before this Court.

(b) *Individual Appellees.* In its Statement as to Jurisdiction filed with this Court (p. 8) appellant asserted that it was plainly entitled to an adjudication that the individual appellees violated the statute and therefore the injunctive provisions of the decree should run against them. Appellant now concedes that the District Court gave proper and adequate relief in directing the injunctive provisions of the decree against the appellee companies, their respective officers, directors, agents, etc., and concedes that "under the circumstances of this case" injunctive provisions against the individual appellees would be unnecessary (Br. p. 60). Nevertheless, appellant persists in its contention that it is entitled to an adjudication that the individual appellees violated the Act. Its position is inconsistent and untenable.

Upon the motion for summary judgment based upon the admitted facts as to the industry-wide licenses with price limitation, concert of action was found only with respect to the companies and not the individuals. Appellant contended that it was entitled to such a judgment although the legality of each separate license contract be assumed upon the present state of the record. Appellant failed to estab-

lish a conspiracy to enter into the patent license contracts as charged in the complaint, and there is no evidence in the record of any deliberate intention of the individual appellees to violate the law.

In a case like this it could only be proper, upon the granting of a motion for summary judgment, to adjudicate that the appellee companies had acted in concert in restraint of trade in gypsum board in violation of the Sherman Act, as the District Court did in Article III of its decree, which Article this Court expressly affirmed at the time of noting probable jurisdiction.

In support of its contention for an adjudication against the individual appellees, appellant advances the inaccurate statement (Br. p. 61) that "each of them has been a party to one or more of the license agreements . . .". The facts are that none of the individual appellees was a party to any of the license agreements but simply that each of them as an officer of one of the appellee companies executed one or more of such agreements on behalf of his company.

Appellant makes the wholly unwarranted statement that appellee Sewell L. Avery "was admittedly the principal architect of the concerted price fixing and other restraints which have been adjudged illegal". Every charge in the complaint against any individual appellee was sharply controverted by the pleadings and by the appellees' offer of proof. They were not determined upon the granting of appellant's motion which was premised, as shown, upon admitted facts and upon the assumed legality of each separate license contract. Furthermore, by the procedure which appellant chose to obtain its judgment, Mr. Avery was deprived of the opportunity of testifying in the exercise of



his constitutional right to be heard before there could be any adjudication as to any charge against him individually.

Recognizing that it is completely protected by having the injunctive provisions of the decree run against the appellee companies and their respective representatives, appellant seeks an adjudication against the individual appellees because, it asserts, the decree of the court below, if not changed, will stand as a precedent for the proposition that corporate officers may be insulated from the provisions of the Sherman Act by the "guilt" of their corporate principals (Br. pp. 61-62). But the decree entered by the District Court does not afford any such precedent. There is not any evidence in the record and no finding by the court below that any of the individual appellees intended to violate the law, or that any of them performed any acts with respect to the subject matter of this action except as an officer of one of the appellee companies. It is the appellant who is here seeking to create a dangerous precedent, not the appellees, by asking this Court to hold that when a corporation is found to have violated the law, the judgment may include its officers, individually, although they have not had an opportunity to be heard in their own defense.

(c) *Taxable Costs.* Appellant urges as error the action of the District Court in assessing against the appellee companies 50% of the costs of the proceeding instead of the full taxable costs (Br. pp. 62-64). In this connection it asserts that it is implicit in the District Court's ruling that a violation of the Sherman Act resulting from a mistaken view as to the law's scope is not a full-fledged violation of the statute but a special category of violation meriting lenient and preferred treatment.

It is well established that the matter of taxing costs is one within the discretion of the trial court. *Kansas City Southern Ry. Co. v. Guardian Trust Company, et al.*, 281 U. S. 1, 9 (1930). There is nothing in Rule 54(d) of the Federal Rules of Civil Procedure or *Chicago Sugar Company v. American Sugar Refining Company*, 176 F. (2d) 1, 11 cited by appellant (Br. pp. 62-63) which conflicts with the general rule as stated.

This case was tried by appellant upon the theory that appellees had entered into a plan or agreement to fix prices or otherwise restrain commerce in gypsum products in part by the use of license contracts which were not *bona fide* but entered into simply to give color of legality to the alleged combination. In this appellant failed to establish its case. It now relies upon a theory of law violation based upon concerted action arising out of the plurality of industry-wide license agreements with price fixing which theory was not foreseen either by the appellees and their counsel or the appellant and its counsel. There is a serious question whether it is even alleged in the complaint. Upon the theory which appellant adopted on its motion for summary judgment, no evidence was necessary to sustain its motion except those facts which appellees never even denied. Appellant's case could have been submitted to the court for judgment upon the introduction in evidence of the license agreements and the bulletins issued thereunder.

It was undoubtedly the realization of these facts, as well as the failure to show actual or deliberate intent on the part of any of the appellees to violate the law, which prompted the District Court to assess 50% of the taxable costs against appellees. Under the circumstances clearly it was not an abuse of discretion.

**CONCLUSION**

For the foregoing reasons the judgment of the District Court should not be disturbed.

Respectfully submitted,

BRUCE BROMLEY,

*Attorney for Appellees  
United States Gypsum Com-  
pany, Sewell L. Avery and  
Oliver M. Knode,*

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CRANSTON SPRAY,  
ALBERT R. CONNELLY,  
HUGH LYNCH, JR.,  
*Of Counsel*

October 11, 1950

## APPENDIX

IN THE  
**United States District Court**  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

*Plaintiff,*

*against*

MASONITE CORPORATION, THE CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS CORPORATION, ~~JOHNS-MANVILLE~~ SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMPANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY and DANT & RUSSELL, INC.,

*Defendants.*

Civil Action  
No. 7-498

### FINAL JUDGMENT.

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

I. That the Court has jurisdiction of the subject matter hereof and all of the parties hereto, and that the final judgment entered September 27, 1941, in this cause, whereby the complaint herein was dismissed on the merits, be and hereby is vacated and set aside.

II. That the defendants, Masonite Corporation, Celotex Corporation, Certain-teed Products Corporation, Johns-

Manville Sales Corporation, Insulite Company, Flintkote Company, National Gypsum Company, Wood Conversion Company, Armstrong Cork Company, and Dant & Russell, Inc., have contracted, combined and conspired in violation of Section 1 of an Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", as amended, commonly known as the Sherman Act.

III. That each of the following agency agreements, and the following agreements entered into in connection therewith between Masonite Corporation and the other defendant corporations, as shown in the following table, is adjudged unlawful under the antitrust laws of the United States and is illegal, null and void:

<u>Title of Agreement</u>	<u>Company</u>	<u>Date</u>
Agency Agreement and License Option	Celotex Company	October 10, 1933
Supplemental Agreement	Celotex Company	October 10, 1933
Agency Agreement and License Option	National Gypsum Company	October 31, 1933
Agency Agreement and License Option	Johns-Manville Sales Corporation	November 30, 1933
Supplemental Agreement	Johns-Manville Sales Corporation	November 30, 1933
Agency Agreement and License Option	Armstrong-Newport Company	December 1, 1933
Supplemental Agreement	Armstrong-Newport Company	December 1, 1933
Agency Agreement and License Option	Hawaiian Cape Products Ltd.	December 4, 1933
Agency Agreement and License Option	Wood Conversion Company	June 25, 1934
Supplemental Agreement	Wood Conversion Company	June 25, 1934
Agency Agreement and License Option	Insulite Company	February 2, 1935
Supplemental Agreement	Insulite Company	February 2, 1935
Export Agreement	Insulite Company	February 2, 1935
Supplemental Agreement	Insulite Company	February 8, 1935
Del Credere Factor's Agreement	Celotex Corporation	October 29, 1936



<u>Title of Agreement</u>	<u>Company</u>	<u>Date</u>
Del Credere Factor's Agreement	National Gypsum Company	October 29, 1936
Del Credere Factor's Agreement	Johns-Manville Sales Corporation	October 29, 1936
Del Credere Factor's Agreement	Armstrong Cork Company	October 29, 1936
Del Credere Factor's Agreement	Wood Conversion Company	October 29, 1936
Del Credere Factor's Agreement	Insulite Company	October 29, 1936
Del Credere Factor's Agreement	Hawaiian Cane Products Ltd.	October 29, 1936
Supplemental Agreement	Armstrong-Newport Company	October 29, 1936
Supplemental Agreement No. I	Celotex Corporation	October 29, 1936
Supplemental Agreement No. II	Celotex Corporation	October 29, 1936
Supplemental Agreement No. III	Celotex Corporation	October 29, 1936
Supplemental Agreement No. IV	Celotex Corporation	October 29, 1936
Supplemental Agreement	Hawaiian Cane Products Ltd.	October 29, 1936
Supplemental Agreement No. I	Insulite Company	October 29, 1936
Supplemental Agreement No. II	Insulite Company	October 29, 1936
Supplemental Agreement No. III	Insulite Company	October 29, 1936
Supplemental Agreement No. IV	Insulite Company	October 29, 1936
Supplemental Agreement	Johns-Manville Sales Corporation	October 29, 1936
Supplemental Agreement	National Gypsum Company	October 29, 1936
Supplemental Agreement	Wood Conversion Company	October 29, 1936
Del Credere Factor's Agreement	Flintkote Company	March 16, 1937
Del Credere Factor's Agreement	Dant & Russell, Inc.	June 19, 1937
Agreement	Insulite Company	February 1, 1938
Letter Agreement	Celotex Corporation	September 1, 1940
Letter Agreement	Certain-Teed Products Corporation	September 1, 1940
Letter Agreement	Johns-Manville Sales Corporation	September 1, 1940
Letter Agreement	Insulite Company	September 1, 1940
Letter Agreement	Flintkote Company	September 1, 1940
Letter Agreement	National Gypsum Company	September 1, 1940

<u>Title of Agreement</u>	<u>Company</u>	<u>Date</u>
Letter Agreement	Wood Conversion Company	September 1, 1940
Letter Agreement	Armstrong Cork Company	September 1, 1940
Letter Agreement	Dant & Russell, Inc.	September 1, 1940
Appointment of Agent Agreement	Celotex Corporation	March 20, 1941
Appointment of Agent Agreement	Certain-teed Products Corporation	March 20, 1941
Appointment of Agent Agreement	Johns-Manville Sales Corporation	March 20, 1941
Appointment of Agent Agreement	Insulite Company	March 20, 1941
Appointment of Agent Agreement	Flintkote Company	March 20, 1941
Appointment of Agent Agreement	National Gypsum Company	March 20, 1941
Appointment of Agent Agreement	Wood Conversion Company	March 20, 1941
Appointment of Agent Agreement	Armstrong Cork Company	March 20, 1941
Appointment of Agent Agreement	Dant & Russell, Inc.	March 20, 1941
Appointment of Agent Agreement	Hawaiian Cane Products Ltd.	March 31, 1941
Supplemental Agreement	Celotex Corporation	April 7, 1941
Supplemental Agreement Re Agreement of February 1, 1938	Insulite Company	March 20, 1941
Supplemental Agreement Re Export Agreement	Insulite Company	March 20, 1941

IV. That the defendant corporation and their directors, officers, agents, employees, representatives, successors, subsidiaries, and any person acting or claiming to act under, through or for them or any of them, be and they hereby are perpetually enjoined and restrained:

(1) From enforcing or attempting to enforce any provision in any agreement referred to in Paragraph III above, and from doing any further acts thereunder.

(2) From entering into, adhering to, maintaining or furthering any contract, agreement, understanding, ar-

rangement, plan, or program among themselves or any of them.

- (a) To fix, maintain, or stabilize prices for hardboard.
  - (b) To divide, classify, or allocate customers for hardboard.
  - (c) To restrict, limit, or otherwise restrain competition in the manufacture, sale or distribution of hardboard, but this clause shall not be deemed to interfere with the lawful exercise of lawful patent privileges.
  - (d) To use patent privileges, patents, or patent applications relating to hardboard to secure protection from competition beyond the lawful limits of patent rights.
- (3) From entering into any agreement or arrangement or plan in restraint of interstate trade and commerce or to monopolize interstate trade and commerce so similar to the agreements, arrangements or plans adjudged to be unlawful in Paragraphs II and III of this judgment as to constitute a continuation, repetition, or revival thereof.

V. For the purpose of conforming to the mandate of the Supreme Court of the United States rendered in this cause upon appeal to that Court, and looking toward conforming to the provisions of this judgment, Masonite Corporation is entering into a new Factor's agreement with each of the other defendant corporations, except Insulite Company, and a like agreement with Minnesota and Ontario Paper Company which, since the trial of this cause, has acquired substantially all the assets of Insulite Company

and succeeded to all its rights and liabilities, a copy of the form of which agreement has been marked Exhibit A and annexed hereto. Said new agreements are hereby determined by the Court to be not inconsistent with the mandate of the Supreme Court in this cause.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof, and for such further orders, directions or relief as may be necessary or appropriate to remove or prevent the misuse (whether past, present or future, if any) of patent rights relating to hardboard in violation of the Sherman Law.

VII. That the plaintiff recover from the defendants its costs herein as taxed in the sum of \$398.70 and that execution issue therefor.

Approved:

ALFRED C. COXE,  
*United States District Judge.*

Dated the 1st day of October, 1942.  
Judgment rendered October 21st, 1942.

GEORGE J. H. FOLLMER,  
*Clerk.*  
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